No. 04-593

Supreme Court, U.S.
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In The

Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC. AND DEBBIE PEAR,

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does Respondent John McDonald, president and sole shareholder of JWM Investments, Inc., have standing to assert personal claims, under 42 U.S.C. § 1981, for defamation and racial discrimination, even though JWM was also harmed?

CORPORATE DISCLOSURE STATEMENT

Respondent John McDonald is not a corporation that has issued shares to the public, nor is he a parent corporation, subsidiary, or affiliate of corporations that have done so.

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STATEMENT OF THE CASE

This case involves the claim by Respondent, John McDonald, an African-American, for violation of 42 U.S.C. § 1981 racial discrimination. As set forth in the Complaint (App. 11-14), Mr. McDonald was the sole officer, director, and stockholder of JWM Investments, Inc., a Nevada Corporation. Acting for JWM, in January 1997, McDonald entered into four corporately secured lease contracts to construct restaurants in and around Las Vegas, Nevada for Domino's Pizza to lease. To McDonald's information and belief, he was the only African-American developer utilized by Domino's Pizza to construct restaurants in the Southwestern United States.

The lease in question was for a ten-year period with options to extend. A key provision stated that Domino's would execute estoppel certificates for the properties if required to do so for financing and/or sale purposes. When the necessity arose, however, Debbie Pear the Real Estate Negotiator for Domino's, refused to sign any requests sent on behalf of JWM by McDonald. McDonald was startled by these turn of events, for he was informed and believed that Pear and Domino's regularly performed on their contracts with other contractors, who were white.

Pear's refusal to comply with the terms of the contract was the first of many indignities to McDonald. She subsequently called the Las Vegas Valley Water District to remove JWM as landowner and falsely substitute herself and Domino's. This illicit action required McDonald to meet with Water District authorities and prove ownership of the land.

Despite these affronts, McDonald telephoned Pear to reiterate his determination to fulfill the contracts. In

response, Pear told McDonald she would see to it that McDonald personally would experience serious financial repercussions and the loss of his business and financial position if he didn't voluntarily terminate his dealings with Domino's after completing the Bonanza Road restaurant. McDonald then reminded Pear that JWM had four contracts with Domino's and he intended to see them through to completion. Pear replied that she had little tolerance for working with him, stating: "I don't like dealing with you people anyway." Shocked by this "you people" remark, McDonald prodded Pear for an explanation, but she refused one. Pear declared, however, she would personally see to it that Domino's did no further business with McDonald and threatened to use company attorneys to bury McDonald if he initiated a court action. The conversation concluded with Pear informing McDonald that he "didn't have a chance in hell," of winning. She then slammed down the receiver before McDonald could respond.

After that telephone conversation, Domino's routed McDonald's calls to Vice President General Counsel Joe Graziani. Mr. Graziani informed McDonald that despite Pear's comments, Domino's would honor the lease contracts and sign the estoppel certificate, but only if McDonald agreed to amend the contracts. Because McDonald refused to amend the contracts, Domino's denied McDonald the necessary estoppel certificates to which both parties had previously contracted and were rightfully McDonald's.

Despite Domino's refusal to satisfy their contractual promises, McDonald performed his obligations to the specifications set out by Domino's. Fulfilling the terms proved to be an extremely frustrating and costly process,

however. Since Domino's refused to sign the estoppel certificates, McDonald had to forgo numerous construction offers, lost financing for projects not yet started, and was unable to realize potential sales of real property. Because McDonald's business depends entirely on his ability to secure land and then develop, sell, or lease it, Domino's refusal to make good on the estoppel certificates locked up JWM's resources, thus jeopardizing McDonald's company.

McDonald's financial situation was further damaged by two events: (1) When Domino's failed to pay rent on the completed restaurants they already occupied; and (2) by Pear's derogatory statements about McDonald to Steward Olson, the chief lending officer for Nevada First Bank, who had formerly agreed to finance the construction of two of the restaurants. According to Mr. Olson, Pear's statement caused him to believe that McDonald was personally dishonest and untrustworthy. With few resources and fewer prospects, JWM filed for chapter 11 Bankruptcy (*In Re JWM Investments, Inc.*, Case No. 00-19303 LBR, U.S. Bankruptcy Court, District of Nevada).

Subsequent to Domino's discriminatory measures, McDonald's personal net worth collapsed by as much as $8,000,000. A half a million of this amount came from personal certificates of deposit he had pledged against the loans. Because of the bankruptcy and personal defamation, his credit is now ruined. Furthermore, McDonald had been unable to finance a piece of property he holds as well as a hospital loan and medical office building under development. With regard to insurance matters, McDonald cannot acquire general liability insurance to insure his business office and its grounds, and home-owners insurance for his family home.

McDonald has also suffered severe emotional distress: His blood pressure soared and he gained a hundred pounds. To lose weight and keep from gaining more, McDonald had gastric bypass surgery. At this time, a portion of his stomach and gall bladder, damaged from stress, were removed as well.

On March 8, 2002, McDonald, filed this case against Domino's Pizza, LLC, Domino's Pizza, Inc. and Debbie Pear. The action was prompted by acts of racial discrimination against Mr. McDonald personally that abridged his right to contract and caused him monetary damages and damages for pain and suffering, emotional distress, mental anguish, humiliation. Moreover, Domino's ruined McDonald's credit and ability to get insurance for business and personal ventures. Respondent brought this action under 42 U.S.C. § 1981, as amended, which guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." App. 15-17.

On August 21, 2002, in an unpublished opinion, the District Court granted Domino's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. Petitioners did not dispute the facts alleged in the Complaint, but argued that McDonald had no standing to either enforce the contract or to seek damages, since his company, JWM Investments, Inc. was party to the agreement rather than McDonald personally. App. 3-7.

A three-judge panel of the Court of Appeals for the Ninth Circuit reversed the District Court's ruling in an unpublished memorandum on June 18, 2004 stating that McDonald personally alleged discriminatory injuries

separate and apart from those of JWM. App. 1-2. On August 2, 2004, Domino's petition for rehearing and petition for rehearing en banc were denied. App. 8.

REASONS FOR DENYING THE WRIT

I. Piecemeal review by this Court does not serve the goal of judicial efficiency.

Domino's Pizza, Inc., et al. (Domino's) has petitioned for a writ of certiorari to reverse the Court of Appeals unpublished determination that John McDonald has standing to bring a cause of action under 42 U.S.C. § 1981. The appellate decision creates no precedent, being limited only to the instant case. Thus, it is similar to the situation in *Kasky v. Nike*, 539 U.S. 654, 660 (2003), where this Court concluded that a review prior to the trial court determination on the merits might result in piecemeal review that would not serve the goal of judicial efficiency.

Here, as in *Kasky*, "an opinion on the merits in this case could take any one of a number of different paths." Domino's might prevail on the merits, rendering the current writ moot. While the District Court's decision was final, in that it precluded any determination on the merits, the Court of Appeals' reversal of that decision did no more than open the case for the trier of fact. The case is ongoing. Thus, the logic in *Kasky* suggests that judicial efficiency would not be served by a grant of the writ at this time.

II. *Gomez v. Alexian Brothers Hospital of San Jose* need not be overruled.

Although Domino's petition concerns the unpublished June 18, 2004 memorandum by the United States Court of Appeals for the Ninth Circuit (App. 1-2) and the August 2, 2004 unpublished order denying rehearing and denying rehearing en banc (App. 8), the gist of its argument is an attack on the 1983 case of *Gomez v. Alexian Brothers Hospital of San Jose*, 698 F.2d 1019 (9th Cir. 1983).

The issue there was whether that plaintiff, a physician of Hispanic ancestry who practiced medicine under a corporation (AES), had standing under Title VII, § 1981, and 42 U.S.C. § 1985(a) to recover damages for the rejection, based on racial animus, of a contract between the hospital and plaintiff's corporation. The Court held that Gomez had standing under all these acts because the hospital's discriminatory actions – statements by the *Gomez* defendant's counsel that "a proposal with too may brown faces will not fly," and that awarding a contract to AES would transform the hospital "into a Mexican Institution," – resulted in personal injuries to Gomez, distinct from those injuries suffered by AES. *Id.* at 1020-21.

Domino's argues that *Gomez's* holding concerning § 1981 is irrelevant for two reasons: (1) very little discussion is specifically devoted to § 1981 (Pet. p. 8) and (2) "once a court has concluded that Title VII applies, § 1981 becomes in effect, superfluous." (Pet. p. 9, n. 5) A careful reading of the *Gomez* decision refutes these arguments. The case begins with an analysis of the requirements for standing – "injury-in-fact" and "distinct and palpable injury" – as it pertains to all acts under which plaintiff sued. *Id.* at 1021-20. The Appellate Court reversed the

District Court, holding that because the humiliation and embarrassment suffered by plaintiff as a result of employment deprivation were, in fact, personal injuries, § 1981 standing existed. *Id.* at 1022.

Petitioners argue that *Gomez* is "first and foremost a Title VII case" because its discussion of Title VII is lengthier than its discussion of § 1981. Obviously the length of discussion is not a measure of the nature of the decision. Contrary to Petitioners' argument, issues that are dealt with in fewer sentences are generally those for which there is little dispute. Where the law is more ambiguous more discussion is needed.

In *Gomez*, the Court wrote a few paragraphs of analysis to determine whether Title VII was intended to cover both employment and independent contractor relationships, and concludes that it does. This conclusion does not undermine the Court's holding that *Gomez* had § 1981 standing, a conclusion that the Court found no need to expound upon at length. It is important to note that Dominos's appears to take two contradictory positions concerning *Gomez's*. The first is that the case's treatment of § 1981 standing is superfluous, while the second is that *Gomez* must be overturned because of case's treatment of that issue. Both of these are incorrect.

III. Any conflict with other Circuits is not significant.

The cases from other jurisdictions, cited in Domino's petition, do little to undermine the basic premise articulated in *Gomez,* that a plaintiff who shows individual injuries from specific discriminatory actions aimed at him has standing to sue under 42 U.S.C. § 1981. In *Kyles v.*

J.K. Guardian Security Services, 222 F.3d 289 (7th Cir. 2000), the Court held that minority job testers had standing under Title VII but not under § 1981. There, however, § 1981 standing was denied because the *Kyles* plaintiffs never sought a contractual relationship. Thus, the tester's injury, if any, was one that "lies outside the zone of interests that § 1981 protects." *Id.* at 304.

Searcy v. Houston Lighting & Power Co., 907 F.2d 562 (5th Cir. 1990), is also distinguishable. Searcy brought suit on behalf of himself and his company because defendants refused to grant him a contract. The reason for this denial was not based on discrimination. Moreover, unlike the instant case, Searcy made no claim of individual discrimination or harm, beyond that suffered by the corporation. *Id.* at 564.

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, (1st Cir. 1999), dealt with the question of whether the fact that an employee may sue under § 1981 on a hostile work environment theory, also means that an independent contractor can do so. 178 F.3d at 13. Only as an aside did the Court deal with the issue of § 1981 standing for individual plaintiffs. The Court stated that had the issue been raised, it would have held that the corporation, instead of its sole shareholder, had a "potential" claim under § 1981 because the contract in question was between Wal-Mart and Danco, and the suffering of the sole shareholder is "not automatically damage to Danco." *Id.* at 14. The Court explained that although the shareholder was damaged by racial incidents, Danco was not. *Id.* at 14-15.

The contract was henceforth terminated because Wal-Mart was unhappy with Danco's performance on the contract (indeed, Wal-Mart had received notification from

the Maine Department of Environmental Protection that sand removal was inadequate). *Id.* at 11. Because the contract was terminated for reasons other than racial discrimination, neither corporation nor individual were entitled to § 1981 standing. Thus this case had little bearing on the issue in the instant one.

Domino's cites *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (10th Cir. 2002), for the proposition that an individual plaintiff has no standing to pursue a § 1981 claim when her emotional distress arises from the failure of defendants to contract with her corporation. *Id.* at 1072. In *Guides*, the Court simply found plaintiff's emotional distress the result of the economic damages suffered by her corporation. Because, the claim was neither personal nor distinctive, she had no personal standing under § 1981. *Id.* at 1072-73. The 10th Circuit case suggests not a blanket ban of individual standing in § 1981 cases, but the requirement for separate discrimination and damage to the individual.

IV. This case does not require immediate review.

Domino's argues that the petition should be granted because the Ninth Circuit's decision will "open the floodgates" to ill advised § 1981 claims within the Circuit. (Pet. p. 16) However, as the appellate decision is unpublished and "may not be cited to or by the courts of this [Ninth] Circuit," (App. 1), there is little if any possibility that the decision will have such an impact. Nor have Petitioners shown any immediate need for an immediate review of *Gomez, supra*. It has been twelve years since that decision, with little of the monumental consequences suggested in the petition.

The decision by the Court of Appeals did little, if anything, to alter the status quo in terms of standing to bring a § 1981 action. Thus, the goal of judicial efficiency and the desire to avoid the possibility of piecemeal litigation clearly outweighs any desire on the part of Petitioners for immediate review by this Court.

CONCLUSION

For all the foregoing reasons the writ of *certiorari* should be denied.

Respectfully submitted,

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